No. 93-518

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

FLORENCE DOLAN,
Petitioner,

v.

CITY OF TIGARD,
Respondent.

On Petition for Writ Of Certiorari
To The Oregon Supreme Court

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONER

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Date: November 4, 1993

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Pursuant to Rule 37.2 of the rules of this Court, *amici curiae* respectfully move for leave to file the attached brief *amici curiae* in support of petitioner. Petitioner has consented to the filing of this brief; however, the respondent has refused to provide consent.

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with over 100,000 members and supporters nationwide, many of whom are small business owners and property owners who are subjected to a variety of exactions imposed by regulatory authorities at the local, state, and federal level as conditions on the reasonable use of their property. WLF devotes a substantial portion of its resources to litigating cases dealing with property rights in this and other courts. *See, e.g., Lucas v. South Carolina Coastal Comm'n*, 112 S. Ct. 2887 (1992). More pertinently, WLF appeared as an *amicus* in the instant case before the

Oregon Supreme Court, and can bring a broader perspective to the issues than the parties before this Court.

The Allied Educational Foundation (AEF) is a nonprofit charitable and education foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and economics, and has appeared before this Court as an *amicus* with WLF in *Lucas* and other cases.

Amici believe that their participation in this case will assist the Court in better understanding the issues in this case and the urgent need to have this Court clarify its ruling *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). *Nollan* has been seriously misinterpreted by the Oregon Supreme Court and other courts to the detriment of thousands of property owners nationwide.

It is also vitally important for the Court to clarify this issue because in these times of dwindling public fiscs, governmental authorities have increasingly resorted to imposing developmental exactions as a way of acquiring property and services at no cost to it. The case at bar and many others represent precisely the sort of blanket exaction which has been characterized as an "out-and-out plan of extortion." *J.E.D. Associates, Inc. v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

Accordingly, *amici* respectfully request that they be granted leave to file the annexed brief.

Respectfully submitted,

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INTRODUCTION AND STATEMENT OF THE CASE

In the interests of judicial economy, *amici* Washington Legal Foundation, *et al.*, adopts by reference the statement of the case as presented in the Petition for Certiorari filed by petitioner Florence Dolan. Nevertheless, *amici* will briefly present those aspects of the case that are pertinent to the arguments presented in this brief.

The Petitioner, Florence Dolan, owns a 1.67 acre commercial lot on Main Street in the City of Tigard, Oregon. The lot is currently occupied by a 9700 square foot building used for the operation of a retail electric and plumbing supply store. The lot is contiguous to Fanno Creek, a small stream that runs adjacent to the lot. Petitioner's late husband, John T. Dolan, proposed to

expand their business by tearing down the existing building and by erecting a new 17,600 square feet building more suited to their needs and the needs of their customers. Together with her late husband, Petitioner applied to the city for the appropriate permits. The city was disposed to grant the permits but exacted as a condition for their approval that the Dolans dedicate to the city: (1) all of the portions of their lot lying within the 100 year floodplain, for use by the city as a greenway; and, (2) an additional 15 foot strip of property adjacent to and above the 100 year floodplain, for use for future reconstruction of a storm drainage channel and as a public pedestrian/bicycle pathway.

The Dolans initially appealed the permit conditions to the Oregon Land Use Board of Appeals (LUBA) alleging a violation of the Fifth and Fourteenth Amendments to the United States Constitution. LUBA dismissed this appeal, however, because, in its view, the Dolans' federal constitutional claim was not yet ripe. LUBA was of the opinion that this Court's precedents required the Dolans to pursue a variance before seeking judicial relief. The Dolans dutifully applied to the city for a variance which was denied by the city. The Dolans then initiated this appeal which was successively rejected by LUBA, the Oregon Court of Appeals and now by the Oregon Supreme Court, sitting *en banc*. Mrs. Dolan now appeals to this Court.

In 1973, the State of Oregon enacted a law requiring local governments to adopt comprehensive land use plans in compliance with statewide land use goals. One of the state land use goals, Goal 5, requires local governments to provide programs to protect, *inter alia* "[l]and needed or desirable for open space." Pet. App. I-1. Another goal, Goal 12, requires local governments to adopt a plan providing for a safe, convenient and economic transportation system which would "consider all modes of transportation including... bicycle and pedestrian." Pet. App. I-2. State law does not prescribe any particular means of achieving these noble goals, however.

The city has adopted a comprehensive land use plan to comply with the requirements of state law. The plan, last revised in 1983, includes a finding that the city would develop policies to retain "a vegetative buffer along streams and drainageways, to reduce runoff and flood damage and provide erosion and siltation control." Pet. App. J-1. The city's plan for Fanno Creek proposes to implement this noble policy by requiring the "dedication of all undeveloped land within the 100-year floodplain plus sufficient open land for greenway purposes specifically identified for recreation within the plan." Pet. App. J-1, 2. The dedication requirement applies to all proposals for development along Fanno Creek irrespective of the extent to which the proposals contribute to the need for the land dedicated or the portion of the tract that is located within the 100-year floodplain.

The question presented concerns principally the proper interpretation of this Court's decision in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), which all parties concede controls the case at bar. To justify its exaction in this case, the city has made a series of findings which it believes establishes that the dedication requirements are "reasonably related to the applicant's request to intensify the development of this site."[1] The "findings" fairly establish that Petitioner's proposed intensified use of the site may contribute in at least some degree to the need for a pedestrian/bicycle pathway and for public stormwater management in the Fanno Creek watershed. But the "findings" do not attempt further to qualify or quantify this contribution.

In its decision, the majority of the Oregon Supreme Court rejected Petitioner's contention that *Nollan v. California Coastal Comm'n*, *supra*, established a

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[1] The city's "findings" are quoted extensively by the majority and dissenting opinion's of the Oregon Supreme Court. *See* Pet. App. A-5, A-8; A-19, A-23.

heightened standard of judicial scrutiny for exactions. In the majority's view, *Nollan* "tells us that an exaction is reasonably related to an impact if the exaction serves the same purpose that a denial of the permit would serve." Pet. App. A-15. Because the city's findings establish that Petitioner's intensified use of her land will contribute in at least some degree to the needs served by the its dedication requirements, the Oregon Supreme Court concluded that the city had satisfied its burden under *Nollan* to establish an "essential nexus" between the exaction and Petitioner's use of her land.

Justice Peterson dissented from the majority view. *See* dissenting opinion of Justice Peterson, A-17 *et seq*. In his dissenting opinion, Justice Peterson decried the facile and conclusory nature of the city's findings, which, while clearly demonstrating, in his view, the city's resolve to get the easements, failed to establish anything more than a speculative connection between the Petitioner's proposed use of her land and the need for the exactions. Citing the passage from *Nollan* which states that this Court views "the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination," 483 U.S. at 841, Justice Peterson concluded that the *Nollan* decision required more than the "theoretical nexus" established by the city's findings in the case at bar. Pet. App. A-19.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE A CONFLICT AMONG STATE AND FEDERAL COURTS AS TO WHETHER *NOLLAN* REQUIRES THE APPLICATION OF A HEIGHTENED LEVEL OF SCRUTINY FOR DEVELOPMENTAL EXACTIONS

A. Most Courts Have Required The Application Of Some Standard Of Proportionality To Justify Developmental Exactions

While judicial scrutiny of subdivision control exactions dates back to the late nineteenth century,[2] most modern treatments of the subject begin with *Ayres v. City Council of Los Angeles*, 34 Cal.2d 31, 207 P.2d 1 (1949).[3] In *Ayres*, the California Supreme Court upheld a municipal street exaction because it found the need for the street to be "***reasonably related*** to increased traffic and other needs of the proposed subdivision." *Id.*, 34 Cal.2d at 42. (Emphasis added.) *Ayres* has given rise to widely diverging interpretations, however. In *Parks v. Watson*, 716 F.2d 646, 651 (9th Cir. 1983), the Ninth Circuit Court of Appeals presented *Associated Home Builders of Greater East Bay, Inc. v. City of Walnut Creek*, 94 Cal Rptr 630, 4 Cal App 3d 633, 484 P.2d 606 (1971) and *Pioneer Trust and Sav. Bank v. Village of Mount Prospect*, 22 Ill 2d 375, 176 NE 2d 799 (1961) as paradigmatic of the two poles in the modern debate over developmental exactions. Ironically, both of these decisions present themselves as relying on *Ayres*.

While the schema presented by *Parks* is probably an oversimplification, it will nevertheless serve as an adequate basis for framing the issue in this case. At the one extreme stands the approach taken by the California courts prior to *Nollan*, which has now been adopted by the Oregon Supreme Court. As originally enunciated in *Associated Home Builders of Greater East Bay, Inc. v. City of Walnut Creek*, *supra*, and later refined in *Grupe v. California Coastal Comm'n*, 212 Cal Rptr 578, 166 Cal App 3d 148 (1985), the California courts held that a developmental exaction need not be directly related to the needs created by a developer's activity to be sustained. It is enough that the developer, either by himself, or in conjunction with others, contributes generally to the needs

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[2] *See* Johnston, *Constitutionality of Subdivision Control Exactions: The Quest for a Rationale*, 52 Cornell L.Q. 871, 876-886 (1967).

[3] Hagmen, *Urban Planning and Land Development Control Law*, at 254 (1975) refers to *Ayres* as the "leading case on subdivision exactions."

toward which the exaction is directed, even if his development itself derives no benefit from the exaction. In *Grupe*, the plaintiff's beach-front home was "one more brick in the wall separating the People of California from the state's tidelands." 212 Cal Rptr at 589 & n.11. As far as the California courts were concerned, that settled the matter.

At the other end of the judicial spectrum stands the approach taken by the Illinois Supreme Court in *Pioneer Trust and Sav. Bank v. Village of Mount Prospect*, *supra*. According to the Illinois Supreme Court, a developmental exaction is valid only if the burden cast on the developer is "specifically and uniquely attributable to his activity." 176 NE2d at 802. Thus, the need alleviated by the exaction must be created solely by the developer's activity and the benefit derived from the exaction must accrue solely to the assessed property. The Illinois Supreme Court has been followed by a number of leading cases. *See Billings Properties Inc. v. Yellowstone County*, 144 Mont 25, 394 P2d 182 (1964); and *Frank Ansuisi, Inc. v. City of Cranston*, 107 RI 63, 264 A 2d 910 (1970).

The California rule places a heavy burden upon the developer to show that a particular exaction has *no* relationship whatsoever to a proposed development project. While it is more flexible than the old Illinois rule, it is also allows local governments "almost unlimited discretion in the imposition of dedication requirements." *Wald Corp. v. Metropolitan Dade County*, 338 So2d 863, at 866 (Fla.D.C.A. 1976). The old Illinois rule, on the other hand, does substantially reduce the potential for taking by subterfuge, but places a heavy burden on municipalities to show a *specific* connection between a particular subdivision and a specific street or park or school. This task is particularly difficult with regard to small residential subdivisions which contribute to the need for parks or roads or schools, but which lack sufficient land to dedicate for those purposes. The rigidity of the old Illinois rule

explains why most courts have sought to find a middle ground between the two extremes.[4]

Within the middle of the spectrum of judicial thought, at least two in-their-origins distinct schools may be identified. The first is the approach taken by the Wisconsin Supreme Court in *Jordan v. Village of Menomonee Falls*, 28 Wis 2d 608, 137 NW2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966), and its progeny.[5] *Jordan* concerned the validity of an impact fee for parks and schools. The Wisconsin Supreme Court recognized that it was unrealistic to expect a municipality to show that a proposed exaction was *exclusively* attributable to a specific subdivision. While it retained the term "specifically and uniquely attributable" as the proper yardstick for measuring the validity of exactions, it nevertheless noted that this standard was not to be applied too strictly so as to cast an unreasonable burden on municipalities.

The second school of thought occupying the broad middle ground is that taken by the New Jersey courts as exemplified by *Longridge Builders, Inc. v. Planning Board of Princeton Township*, 52 NJ 348, 245 A2d 336 (1968); and *181 Incorporated v. Salem County Planning Board*, 133 NJ Super 350, 336 A2d 501 (1975). In the typical New Jersey case, a road or some similar public improvement is projected on an official map or plan. As fate would have it, the projected infrastructure intersects a particular parcel of land proposed for development, or at least it is close enough that the development can be said in

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[4] The Illinois courts have themselves recently abandoned their old rule in favor of a more flexible approach. *Plote, Inc. v. Minnesota Alden Co.*, 52 Ill 550, 96 Ill App 3d 1260, 422 NE2d 231 (1981).

[5] *See Aunt Hack Ridge Estates, Inc. v. Planning Commission*, 160 Conn 109, 273 A2d 880 (1970); *Collis v. City of Bloomington*, 310 Minn 5, 246 NW2d 19 (1976); *Briar West, Inc. v. Lincoln*, 206 Neb 172, 291 NW2d 730 (1980); and *Call v. West Jordan*, 614 P2d 1257 (Utah 1980).

some sense to require it. The question, of course, is under what circumstances can the developer be forced to pay for the needed infrastructure? The answer of the New Jersey courts has been twofold: First, there must be a "substantial, demonstrably clear and [temporally] present" connection to the development project and the prospective infrastructure. *181 Incorporated*, *supra*, 336 A.2d at 506.[6] Second, the costs of the proposed improvement must be properly apportioned between the developer and the public. "[A subdivider may] be compelled only to bear that portion of the cost which bears a rational nexus to the needs created by, and benefits conferred upon, the subdivision." *Longridge Builders, Inc. v. Planning Board of Princeton Township*, 245 A2d at 337. Generally speaking it may be said that the rules for the allocation of the costs are derived from the law of special assessments. *See Divan Builders, Inc. v. Planning Bd. of Tp. of Wayne*, 66 NJ 582, 334 A2d 30 (1975).

The use of the term "rational nexus" within the context of developmental exactions would seem to have been popularized by Johnston's, *Constitutionality of Subdivision Control Exactions: The Quest for a Rationale*, *supra*. The term does not occur in *Jordan* or the earliest cases following *Jordan*. Nor does it occur in any of the New Jersey cases prior to *Longridge*. In the first few decisions that do employ the term, it usually occurs in a quote or at least while citing Johnston.[7] Nonetheless, since *Wald Corp. v. Metropolitan Dade County*, *supra*, it has become customary to refer to both the *Jordan* and New

[6] This is sometimes called a "cause and effect" relationship. *Pennell v. San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., dissenting).

[7] *See Collis v. City of Bloomington*, 246 NW2d at 24; and *Longridge*, 245 A2d at 237.

Jersey schools in rather syncretistic fashion as the "rational nexus test" without further qualification.[8]

While the *Jordan* and New Jersey schools differ with regard to their historical origins, they are united by two factors which also serve to distinguish them from the approach taken by the California courts prior to *Nollan*: First, they place a substantial though not unreasonable burden on the municipal government to justify its exactions. *See Collis v. City of Bloomington*, 310 Minn 5, 246 NW2d at 25 (1976) ("Standards can be developed and supported only after considerable data have been gathered and carefully analyzed"). Second, they require a proper allocation of the public and private costs of proposed improvements, except in those circumstances where a particular development project, or group of projects, is the sole beneficiary of the projected improvements.[9]

There are also numerous cases which do not fit easily into any particular school of thought. In *Gulest Ass'n v. Town of Newburgh*, 25 Misc2d 1004, 209 NYS2d 729 (Super. Ct. 1960), *aff'd*, 15 AD2d 815, 225 NYS 538 (App. Div. 1962), for example, a New York Court employed a "direct benefit" test, a term evidently borrowed from the law of special assessments. In *Swing v. Baton Rouge*, 249 So2d 304 (La.App.), application denied, 259 La 770, 252 So2d 667 (1971), a Louisiana court declared a street exaction invalid because the proposed extension of the street served the "primary benefit" of the public at large. In *Home Builders*

[8] *See Wald*, *supra*, 338 So2d at 867-868; and *Howard County v. JJM, Inc.*, 301 Md 256, 280-81, 482 A2d 908 (1984).

[9] With regard to impact fees, definite rules have been developed to prevent the commingling of funds and to ensure that funds are in fact expended within a reasonable period of time for the purposes for which they were ostensibly raised. *See Hollywood, Inc. v. Broward County*, 431 So2d 606, 612 (Fla. 4th DCA), *rev. denied*, 440 So2d 352 (Fla. 1983). *See also*, *Banberry v. South Jordan City*, 631 P.2d 899, 903-904 (Utah 1981).

Association of Greater Kansas City v. City of Kansas, 555 SW2d 832, 835 (Mo. 1977), the Missouri Supreme Court held that a park dedication requirement or impact fee could be sustained so long as the burden cast on the developer was "reasonably attributable" to the developer's activity. In *Lampton v. Pinaire*, 610 SW2d 915 (Ky. App. 1980), a Kentucky court declared a street exaction reasonable so long as it was based on the "reasonably anticipated burdens" to be caused by the development. In *City of College Station v. Turtle Rock Corp.*, 680 SW2d 802 (Tex 1984), a Texas court adopted a "reasonable connection" standard to assess the validity of a park exaction, citing the American Law Institute's *Model Land Development Code* § 2-103 at 38 (1976).

While a few of the cases which we have cited above place the burden on the developer challenging and exaction to show that the necessary connection to the needs created by the developer's own activity is not present, *see eg.*, *City of College Station v. Turtle Rock Corp.*, *supra*; and *Call v. West Jordan*, *supra*, virtually all of the cases outside of California, and now Oregon, require some fair standard of apportionment of costs in accordance with the public and private contribution to the need for a public improvement. In most instances, these cases draw either explicitly or implicitly on the language of special assessments. *See*, *eg.*, *Bethlehem Evangelical Lutheran Church v. Lakewood*, 626 P2d 668, 672 (Colo. 1981) ("The theory upon which the owner of the property abutting a street may be required to pay the costs of public improvements... is that the property is ***especially*** benefited by the improvements over and above the general benefit to the public at large"). (Emphasis in original.)[10]

[10] The Oregon Supreme Court has itself acknowledged that a special assessment cannot be upheld without "some system of *just apportionment*." *MacVeagh v. Multnomah County*, 126 Or 417, 270 P 502 (1928)(emphasis added).

B. *Nollan* Requires Some Standard Of Proportionality To Justify Imposing Developmental Exactions Without Just Compensation

Initially, most courts and commentators interpreted the decision of this Court in *Nollan* as requiring a higher standard of judicial scrutiny for exactions than that heretofore required by the California courts. *See* Petition for Certiorari, at 23-25. In *Commercial Home Builders v. Sacramento*, 941 F.2d 872 (9th Cir. 1991), a panel from the Ninth Circuit doubted whether *Nollan* had done anything to change the standard of scrutiny applicable to exactions. Subsequent to this Court's summary affirmance of *Commercial Home Builders*, *see* 112 S. Ct. 1997 (1992), a small number of jurisdictions appear to be vying with each other to see how far they can go before this Court will intervene.[11] The case at bar goes pretty far. At oral argument before the Oregon Court of Appeals, the city conceded that the Dolans would be required to dedicate the same amount of land even if they were proposing to erect a "15 cubic foot fruit stand" instead of a 17,600 square foot building. *Cf.* Petition For Writ of Certiorari, at 11-12, citing Audio R. Tape, *Dolan v. City of Tigard*, 113 Or App, 832 P2d 853 (1992), argued 4-13-92, Cue No. 40.[12] While part II of the *Nollan* decision was

[11] Aside from the case at bar, two other recent cases are particularly troubling. *Cf. Pengilly v. Multnomah County*, 810 F. Supp 1111 (D.Or. 1992) (sustaining a blanket exaction requiring all persons who happen to improve land adjacent to a public road to dedicate additional right-of-way); *and Ehrlich v. City of Culver City*, 15 Cal App 4th 1737 (2nd Dist. CA 1993), petition for review denied, (No. S033642, Aug. 1993)(sustaining impact fee based on loss of "recreational opportunities" ostensibly created developer's discontinued operation of an unprofitable recreational facility).

[12] Thus, the case at bar represents precisely the sort of blanket exaction which the New Hampshire Supreme Court characterized as an "out-and-out plan of extorsion" in *J.E.D. Associates, Inc. v. Atkinson*, 121 NH 581, 584, 432 A2d 12, 14-15 (1981). See also *Nollan v. California Coastal Comm'n*, 483 U.S. at 837.

couched in the terms peculiar to the argument in that case, it is clear that the underlying question was one of proportionality. The dissent clearly recognized that *Nollan* was requiring a closer relationship between the burden created by a proposed development and the condition imposed under the state's police power to mitigate that burden, than the California courts had hitherto required. *Cf. Nollan*, 107 S Ct at 3151 (Brennan, J., dissenting) ("The Court finds this an illegitimate exercise of the police power, because it maintains that there is **no reasonable relationship between the effect** of the development **and the condition imposed**"); and *Id.*, 107 S Ct at 3163 (Blackmun, J., dissenting) ("I disagree with the Court's rigid interpretation of the **necessary correlation between a burden** created by development **and a condition** imposed pursuant to the State's police power **to mitigate that burden**") (emphasis added). Thus, in part III of the *Nollan* opinion, the Court relied on numerous state court decisions applying different proportionality standards. *See Nollan*, 107 S Ct at 3150 (citing cases). While the *Nollan* Court disclaimed the need to decide **which** standard of proportionality should be applied to exactions, 107 S Ct at 3149, it arguably did require the application of at least **some** standard.

This Court's summary affirmance of *Commercial Home Builders v. Sacramento*, *supra*, is not to the contrary. Despite its verbal formulations to the contrary, the Ninth Circuit arrived at its decision in that case only after the city presented:

> a *careful study* reveal[ing] the *amount* of low-income housing that would likely become necessary as a direct result of the influx of workers that would be associated with the new nonresidential development. It assesses only a *small portion* of a *conservative estimate* of the cost of such additional housing.

941 F.2d at 874 (emphasis added). In other words, the exaction in that case *did* satisfy a heightened level of scrutiny.

The case at bar illustrates why heightened scrutiny should be required of exactions. The City of Tigard has found that it is "reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreation needs." Pet. App. at A-5, 6, quoting City of Tigard Planning Commission Final Order No. 91-09 PC at 13, 20-21. And the majority of the Oregon Supreme Court believes that this "finding" should be sufficient to sustain the exaction in the case at bar. And yet, virtually the same finding could have been made if the city were proposing to construct a six-lane interstate freeway through Mrs. Dolans lot. Surely, if the city were to build such a freeway, it would be "reasonable to assume" that Mrs. Dolan's customers would use it. Virtually ***every*** public improvement can be said to benefit ***in some sense both*** the developer and the general public. Under the standard adopted by the Oregon Supreme Court in the case at bar, virtually every exaction would be upheld.

In his dissenting opinion, Justice Peterson draws our attention to the growth in population currently experience by the State of Oregon and it is perhaps as a reaction to the perceived onslaught of *hoi polloi* that we are to attribute the highly deferential approach to exactions adopted by the majority on the Oregon Supreme Court. The adoption of modern zoning laws were justified by this Court on a similar basis over half a century ago. *Cf. Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) ("[B]ut with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities").

Considered in its best light, the City of Tigard may be merely attempting to make those who intensify the use of their land to assume responsibility for the public consequences of their private actions. On the other hand, we know that governments at all levels are experiencing

a shortage of funds due to the current restructuring in our national economy. Congress and state legislatures have an unfortunate propensity to impose mandates on local governments without providing the funds to implement them. And there is also strong public sentiment in virtually every corner of our nation against raising taxes. Local governments are all too often faced with tremendous pressures to shift the burden for needed public improvements onto some narrow segment of society. Developmental exactions are a particularly attractive alternative because their cost is paid for primarily by future residents who cannot as yet vote. They are also among the principle exclusionary devices commonly used by existing communities use to keep certain people out (particularly those who make less money than the current residents do).[13] We do not know on present reading whether the City of Tigard is attempting to make Mrs. Dolan to pay her fair share, or whether it is attempting to accomplish some illicit purpose under the guise of the police powers. We do know that other communities have survived more intense growth pressures than the State of Oregon currently does without suspending constitutional

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[13] *See "Not In My Back Yard" Removing Barriers to Affordable Housing*, Report to President Bush and Secretary Kemp by the Advisory Commission on Regulatory Barriers to Affordable Housing (Washington 1991); *Final Report of the Governor's Task Force on--*Spectrum--*Housing For Economic Growth* at 28-29 (Maryland, December 1, 1990) ("Subdivision regulations can increase the direct cost of land by requiring land improvements and exactions -- particularly considering the increased tendency of local and county governments to negotiate substantial developer contributions and exactions as a condition for plat approval... In some cases subdivision regulations require improvements that exceed the demands of the prospective residents raising serious questions about the legality of these requirements on developers and the subsequent additional costs to a unit of housing"). The crisis in affordable housing is a problem that has been recognized on the national level.

guarantees.[14] We also know that there are sound reasons of public policy for applying a heightened standard of judicial scrutiny to developmental exactions. As Justice Peterson suggested, "If in the fact the government needs to take part of a landowner's property because of intensified uses of the developed property, imposing the burden of showing precisely why the need in fact exists is a modest burden to place on the government." Pet. App. at 29.

CONCLUSION

For the foregoing reasons and those specified in the petition for writ of certiorari, amici curiae urge this Court to grant the writ.

Respectfully submitted,

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[14] Between July 23, 1959, and March 15, 1963, for example, the Village of Menomonee Falls, Wisconsin, approved 41 plats containing 638 lots. The village's population increased from 6,262 in 1950 to 18,276 in 1960, and to a then estimated population of 25,000 in 1964. *Jordan v. Village of Menomonee Falls*, 137 NW2d at 444. The Wisconsin Supreme Court ***sustained*** the park and school exaction there called into question under what we would now call the "rational nexus" test. Clearly, legitimate exactions have nothing to fear from meaningful judicial scrutiny. *Cf.* White, *Development Fees and Exemptions for Affordable Housing: Tailoring Regulations to Achieve Multiple Public Objectives* in Young, *1992 Zoning and Planning Law Handbook*, 301, 310 (1992) (noting that the "rational nexus" test is fast becoming the majority rule in the United States).

a shortage of funds due to the current restructuring in our national economy. Congress and state legislatures have an unfortunate propensity to impose mandates on local governments without providing the funds to implement them. And there is also strong public sentiment in virtually every corner of our nation against raising taxes. Local governments are all too often faced with tremendous pressures to shift the burden for needed public improvements onto some narrow segment of society. Developmental exactions are a particularly attractive alternative because their cost is paid for primarily by future residents who cannot as yet vote. They are also among the principle exclusionary devices commonly used by existing communities use to keep certain people out (particularly those who make less money than the current residents do).[13] We do not know on present reading whether the City of Tigard is attempting to make Mrs. Dolan to pay her fair share, or whether it is attempting to accomplish some illicit purpose under the guise of the police powers. We do know that other communities have survived more intense growth pressures than the State of Oregon currently does without suspending constitutional

[13] *See "Not In My Back Yard" Removing Barriers to Affordable Housing*, Report to President Bush and Secretary Kemp by the Advisory Commission on Regulatory Barriers to Affordable Housing (Washington 1991); *Final Report of the Governor's Task Force on--*Spectrum--*Housing For Economic Growth* at 28-29 (Maryland, December 1, 1990) ("Subdivision regulations can increase the direct cost of land by requiring land improvements and exactions -- particularly considering the increased tendency of local and county governments to negotiate substantial developer contributions and exactions as a condition for plat approval... In some cases subdivision regulations require improvements that exceed the demands of the prospective residents raising serious questions about the legality of these requirements on developers and the subsequent additional costs to a unit of housing"). The crisis in affordable housing is a problem that has been recognized on the national level.

guarantees.[14] We also know that there are sound reasons of public policy for applying a heightened standard of judicial scrutiny to developmental exactions. As Justice Peterson suggested, "If in the fact the government needs to take part of a landowner's property because of intensified uses of the developed property, imposing the burden of showing precisely why the need in fact exists is a modest burden to place on the government." Pet. App. at 29.

CONCLUSION

For the foregoing reasons and those specified in the petition for writ of certiorari, amici curiae urge this Court to grant the writ.

Respectfully submitted,

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[14] Between July 23, 1959, and March 15, 1963, for example, the Village of Menomonee Falls, Wisconsin, approved 41 plats containing 638 lots. The village's population increased from 6,262 in 1950 to 18,276 in 1960, and to a then estimated population of 25,000 in 1964. *Jordan v. Village of Menomonee Falls*, 137 NW2d at 444. The Wisconsin Supreme Court ***sustained*** the park and school exaction there called into question under what we would now call the "rational nexus" test. Clearly, legitimate exactions have nothing to fear from meaningful judicial scrutiny. *Cf.* White, *Development Fees and Exemptions for Affordable Housing: Tailoring Regulations to Achieve Multiple Public Objectives* in Young, *1992 Zoning and Planning Law Handbook*, 301, 310 (1992) (noting that the "rational nexus" test is fast becoming the majority rule in the United States).